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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 905

CHARLES FENSTER,

Appellant,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and AARON E. KOOTA, as District Attorney of the County of Kings,

Appellees.

ON APPEAL TO THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Question Presented	2
Statement	2
ARGUMENT—The statutory court's application of the principle of abstention, under the circumstances here, was a proper exercise of equitable discretion	5
Conclusion	7

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Appellee Aaron E. Koota, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to affirm the order of the statutory three-judge District Court below.

Opinion Below

The opinion of the statutory court dated December 7, 1966, is unreported and appears as appendix A to appellant's jurisdictional statement.

Jurisdiction

Appellant invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1253.

Statutes Involved

N. Y. Code of Crim. Proc. § 887, subd. 1

N. Y. Rev. Penal Law § 240.35

N. Y. CPLR § 3001

N. Y. CPLR, Art. 78

Question Presented

Did the statutory court, under the circumstances here, abuse its discretion in abstaining from exercising its jurisdiction and requiring appellant to pursue his remedies in the Courts of New York?

Statement

This is a direct appeal from an order entered in the United States District Court for the Southern District of New York on December 14, 1966 by a statutory court which denied and dismissed appellant's application for a preliminary injunction and complaint, respectively.

The appellant commenced this action below seeking a judgment declaring unconstitutional § 887, subd. 1 of the New York Code of Criminal Procedure.* The complaint

* The text of New York Code of Criminal Procedure § 887, subd. 1, is set forth in the appellant's "Statement as to Jurisdiction." Most of the provisions currently found in section 887 have been transferred to and included in the Revised Penal Law of New York.

(Footnote continued on following page)

alleges that appellant was arrested on three occasions in 1964 and charged with violation of New York's vagrancy statute, § 887, subd. 1. He was acquitted of the first two charges. Subsequent to his third arrest under that statute, the appellant commenced a proceeding in the state courts to prohibit the criminal court from hearing the charge of vagrancy against him on the ground that such court was acting in excess of its jurisdiction since the vagrancy statute was unconstitutional.

The State Supreme Court, Kings County, dismissed appellant's prohibition proceeding* on the ground that the statute in question was not, on its face, unconstitutional and that accordingly he failed to show a clear legal right to the relief requested. The state court held that appellant, thus, was required to pursue the usual procedures and remedies available to him. *Matter of Fenster* v. *Criminal Court,* 46 Misc. 2d 179, 259 N.Y.S. 2d 67 (Kings Co.), *aff'd* 24 A. D. 2d 840, 263 N.Y.S. 2d 1010 (2nd Dept), *aff'd* 17 N. Y. 2d 641, 216 N. E. 2d 342, *motion for reargument denied,* 17 N. Y. 2d 918.

It must be noted that the respondent Criminal Court, by its attorney, the Attorney General of the State of New York, cross-moved in the state court to dismiss the petition on the ground that a prohibition proceeding was an improper remedy in New York to test the constitutionality of a state statute and that appellant should properly have availed himself of other adequate remedies. The New York appellate courts in affirming the granting of the state's cross-motion, held only, therefore, that the peti-

(Footnote continued from preceding page)

This revised law, effective September 1, 1967 omits the specific provisions involved here. However, it should be noted that the revision of New York's Criminal Code is still in progress; thus although it cannot be authoritatively stated that the provision challenged here will not be included in the revised Criminal Code, the inference strongly suggests that it will not.

* This special proceeding is authorized by the New York Civil Practice Law and Rules, Article 78.

tion was technically insufficient and reached no decision on the constitutional question raised by appellant.

Following the affirmance by the New York Court of Appeals (17 N. Y. 2d 641, 216 N. E. 2d 342), the appellant was tried and acquitted of the third charge of vagrancy.

The appellant in his complaint to the District Court below, simply alleged, without more, that during the pendency of his abortive state court proceeding described above, he was threatened by the police with further arrest and he concludes that he will be subjected to further arrest and prosecution under the vagrancy statute.

The appellee Howard R. Leary, in an affidavit filed in this action, avers that no such threats were made by members of his police force.

No hearing was held before the statutory court below since argument was initially limited by the consent of the parties here to the determination of whether that court should, under the circumstances presented here, abstain from exercising jurisdiction.

In invoking the principle of abstention and, accordingly, in its discretion, dismissing the petitioner's complaint, the statutory court found that none of the special circumstances which were present in *Dombrowski* v. *Pfister,* 380 U. S. 479 and in *Baggett* v. *Bullitt,* 377 U. S. 360, were applicable here. The unanimous three-judge court additionally held that federal jurisdiction should not be exercised simply because appellant improperly instituted a state prohibition proceeding where it is clear that New York affords a declaratory judgment action which is the proper remedy available to an aggrieved party to test, in the first instance, the constitutionality of a state criminal statute (New York Civil Practice Law and Rules § 3001).

ARGUMENT

The statutory court's application of the principle of abstention, under the circumstances here, was a proper exercise of equitable discretion.

It has long been established that the federal courts are extremely cautious in their resort to federally interfere with the state's administration of its criminal laws and normally the "imminence" of a criminal prosecution is not a ground for federal equity relief. *Douglas* v. *Jeannette,* 319 U. S. 157, 163-164. To justify such interference by the federal courts there must be exceptional circumstances and a clear showing, absent here, that an injunction is necessary in order to afford adequate protection of constitutional rights. *Fenner* v. *Boykin,* 271 U. S. 240, 243-244.

This Court in *Dombrowski* v. *Pfister,* 380 U. S. 479, simply re-echoed this proposition; it did not repudiate the long line of decisions flowing from *Douglas* v. *Jeannette, supra.*

Although *Dombrowski, supra,* did hold that the traditional abstention doctrine will not lie where the "defense of the state's criminal prosecution will not assure adequate vindication of constitutional rights." *Id.* at 484-485, the appellant's assertions, as amply illustrated in the opinion below (Statement as to Jurisdiction, appendix A), clearly do not establish any such circumstance which would require the statutory court to exercise its jurisdiction here.

Similarly in *Baggett* v. *Bullitt,* 377 U. S. 360, this Court found that the vagueness of the statute there involved would render the State's declaratory judgment procedure unavailing and accordingly the state court proceedings would not result in the vindication of that petitioner's constitutional rights.

In the instant case, however, no claim is made by the appellant that the state vagrancy statute is vague or will abridge his free expression. Even more critical is the apparent fact that there is no showing by the appellant that state court procedures would be ineffective to vindicate his constitutional rights. Without question, New York provides him with an adequate remedy. If appellant does not wish to wait for a criminal prosecution to assert his challenge to the constitutionality of New York Code of Criminal Procedure § 887, subd. 1, he may, if aggrieved, institute an action for a declaratory judgment in the state court under N. Y. CPLR § 3001.* As the state Appellate Division observed in *DeVeau* v. *Braisted*, 5 A. D. 2d 603, 607 (2d Dept.), *aff'd* 5 N. Y. 2d 236, 157 N. E. 2d 165, *aff'd* 363 U. S. 144, in upholding the use of declaratory judgment to test the validity of a penal statute:

> "one of the very purposes of a declaratory judgment is to settle a serious question of law as the validity of a statute which would be the basis of a threatened prosecution for crime, without requiring, as a prerequisite to judicial entertainment of the question, that interested parties first commit the very acts which are involved in the dispute and thereby run the risk of such prosecution."

The appellant's difficulty with the state adjudicatory process was that he sought to vindicate his alleged claim through an unsound procedural device, i.e., a state prohibition proceeding. By so improperly pursuing this remedy, the state courts have not been "afforded a reasonable opportunity to pass upon" the constitutionality of

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* N. Y. CPLR § 3001 provides:

"The Supreme Court may render a declaratory judgment having the effect of a final judgment to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or can be claimed. If the Court declines to render such a judgment it shall state its grounds."

the state statute in question (*Harrison* v. *N.A.A.C.P.*, 360 U. S. 167, 176), a prerequisite under the circumstances here, to the federal court's initial assumption of jurisdiction.

CONCLUSION

The appellee respectfully prays that the judgment below be affirmed.

Dated: New York, New York, January 23, 1967.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

FENSTER *v.* LEARY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 905. Decided February 13, 1967.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.